

ESTATE OF DOROTHY SHELDON

IBIA 77-57

Decided February 7, 1978

Appeal from a decision denying petition for rehearing.

Reversed in Part, Modified and Remanded.

1. Indian Probate: Wills: Disapproval of Wills

Regardless of scope of Administrative Law Judge's authority to grant or withhold approval of the will of an Indian under statute, there is not vested in the Judge the power to revoke or rewrite a will or a part thereof which reflects a rational testamentary scheme disposing of trust or restricted property.

2. Indian Probate: Wills: Generally

There is a strong presumption that one who takes the time to write a will does not intend to die intestate.

3. Indian Probate: Wills: Construction of

In construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all surrounding circumstances, the objects sought to be obtained and endeavor to determine what was in the testator's mind when he made

the bequests, and the court must not make a new will for testator or testatrix or warp his language in order to obtain a result which the court might feel to be right.

It is well established that, in construing a will the courts will seek for and give effect to the intent, scheme, or plan of the testator, if it be lawful.

The intent must be gathered when possible from the words of the will, construed in their natural and obvious sense.

4. Indian Probate: Indian Reorganization Act of June 18, 1934:
Generally

The Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the Tribe having jurisdiction over such lands and legal heirs of the testator or testatrix.

5. Indian Probate: Indian Reorganization Act of June 18, 1934:
Construction of Section 4

"Any heir of such member" as used in sec. 464 means those who would, in the absence of a will, have been entitled to share in the estate.

APPEARANCES: Lewis A. Bell, Esq., Bell, Ingram & Rice, for appellant, Gwendolyn (Young) Hatch.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Effie Dorothy Sheldon, hereinafter referred to as decedent, died testate January 18, 1976.

The record discloses decedent as "No. 536 on 1965 Tulalip Roll" in the Data For Heirship Finding and Family

History prepared on July 30, 1976, by Randolph E. Williams, Probate Clerk, Western Washington Agency, Bureau of Indian Affairs.

In his Order Approving Will and Decree of Distribution dated January 13, 1977, Administrative Law Judge Robert C. Snashall, decreed the following:

IT IS HEREBY ORDERED that testatrix' Last Will and Testament dated September 5, 1967, be, and the same is, approved and Superintendent of the Western Washington Indian Agency shall, after payment of costs of administration and subject to allowed claims cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised or bequeathed in Clause: SECOND (to GWENDOLYN YOUNG HATCH, an undivided 7/9 and to MELVIN SHELDON, SR. and ROSE MARIE LEWIS, an undivided 1/9 each * * *).

Judge Snashall found that had the decedent died intestate, her heirs at law in accordance with the laws of the State of Washington were, among others, Gwendolyn Hatch (Niece), Rose Marie Lewis (Niece), and Melvin Sheldon, Sr. (Nephew).

Gwendolyn Young Hatch petitioned for rehearing contending that the Judge's order and decree referred to, supra, contravened paragraph SECOND of decedent's Last Will and Testament dated September 5, 1967.

Judge Snashall issued an Order Denying Petition for Rehearing on March 23, 1977, stating therein, concerning paragraph SECOND, that it was illegal to have a trust upon a trust and the property being already

in trust with the United States with the Superintendent acting as trustee on behalf of the United States for the deceased testatrix, the property could not transfer in a non-Federal trust to the said Robert Damion Sheldon had he outlived the decedent herein. However, since he is deceased, pursuant to the provisions of 43 CFR 4.261 (anti-lapse statute) the property would go to his heirs, Gwendolyn (Young) Hatch, Melvin Sheldon, Sr., and Rose Marie Lewis. Accordingly, the one-third ($1/3$) interest would go in one-ninth ($1/9$) interest to each of those persons.

The judge further stated, the end result is that Gwendolyn (Young) Hatch would receive the original two-thirds ($2/3$) plus one-ninth ($1/9$) which would give her a total of seven-ninths ($7/9$); Melvin Sheldon, Sr. would receive one-ninth ($1/9$) and Rose Marie Lewis would receive one-ninth ($1/9$). The judge stated it was obvious the testatrix did not intend any of her estate to go by intestacy; and it was equally clear she did not wish any of her property to go directly to Patty Ann Young, at least not until such person reached the age of 21 years, it apparently being her intention that such of the property left "in trust" was to be used for the support and education of the child. Under the judge's holding that portion of the estate originally intended to be "in trust" for said child goes to the child's mother which would meet the intention of the testatrix as near as can be done in view of the inability to have a trust upon a trust.

Gwendolyn (Young) Hatch filed the original of her appeal with the Western Washington Indian Agency instead of the Administrative Law Judge within the 60 days allowed in the Departmental regulations. 43 CFR 4.291.

We find the failure to comply with the strict letter of section 4.291 not to be fatal to the appellant's cause although mistakenly filed with the Western Washington Indian Agency, since it was timely filed within 60 days after the date of mailing of the notice of the decision being appealed. Estate of James Andrew White, 6 IBIA 79, 84 I.D. 241 (1977).

The grounds for appeal are basically the same as those for rehearing.

[1] Regardless of the scope of an Administrative Law Judge's authority to grant or withhold approval of the will of an Indian under statute, there is not vested in the judge, power to revoke or rewrite a will which reflects a rational testamentary scheme disposing of trust or restricted property. Tooahnippah (Goombi) v. Hickel, 397 U.S. 598 (1970).

Although the Order and Decree of January 13, 1977, was well intentioned, we cannot agree that the judge's disposition of the one-third property interest under paragraph SECOND conforms to the wishes of the testatrix.

The pertinent parts of paragraph SECOND of decedent's will read as follows:

2) One-third thereof I hereby give, devise and bequeath unto my brother, ROBERT DAMION SHELDON, in trust, nevertheless, for the following uses and purposes:

(a) I direct that any cash received shall be deposited into a savings account in a savings bank with his name as trustee, and if any real property shall form a part of the trust when said property is sold, the proceeds shall likewise be deposited into said savings account. My brother shall have no power of reinvestment.

(b) I direct that the trustee shall use so much of the trust fund as may be required for the care, support and education of PATTY ANN YOUNG, my grand niece, who I call "baby doll." When PATTY ANN YOUNG arrives at the age of 21 years, any assets remaining in said trust shall be paid over and delivered to her; provided further, if she shall not then be living, the same shall be paid over and delivered to her mother, GWENDOLYN YOUNG.

(c) If my brother, ROBERT DAMION SHELDON shall die before the distribution of the trust, then I nominate and appoint GWENDOLYN YOUNG as the successor trustee * * *. [Emphasis supplied.]

[2] There is a strong presumption that one who takes the time to write a will does not intend to die intestate. Erickson v. Reinbold, 6 Wash. App. 407, 493 P.2d 794 (1972).

[3] In construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all surrounding circumstances, the objects sought to be obtained and endeavor to determine what was in the testator's intent when he made the bequest,

and the court must not make a new will for him or warp his language in order to obtain a result which the court might feel to be right. Anderson v. Anderson, 80 Wash. 2d 496, 495 P.2d 1037 (1972).

It is well established that, in construing a will, the courts will seek for and give effect to the intent, scheme, or plan of the testator if it be lawful. In re Estate of Shaw, 59 Wash. 2d 238, 417 P.2d 942 (1966).

The intent must be gathered when possible from the words of the will, construed in their natural and obvious sense. In re Estate of Johnson, 46 Wash. 2d 308, 280 P.2d 1034 (1955).

We think it abundantly clear that the testatrix here devised one-third of her property, including trust, restricted and unrestricted, wheresoever situated, to Patty Ann Young. In addition thereto, we think the testatrix did not intend for Patty Ann to take possession until she reached the age of 21 years. If, however, Patty Ann required funds for her care, support or education, the named trustee was to provide same to her from available cash, proceeds received from or royalties derived from restricted or trust property, or the proceeds from the sale of unrestricted property.

Obviously, the testatrix never intended for Melvin Sheldon, Sr., or Rose Marie Lewis, to share in her estate and to conclude otherwise would be contrary to the intentions of the testatrix.

Judge Snashall concluded in effect that restricted Indian lands for which the Secretary of the Interior retains responsibility as trustee, may not be placed in the hands of a private trustee for management for the benefit of the Indian owner. We do not think this to be the case here. Neither Robert Damion Sheldon nor Gwendolyn Young had the power to manage or reinvest.

We believe this case to hinge on the questions of, did the testatrix have the power to devise; did Robert Damion Sheldon or Gwendolyn Young have the power to accept the estate in trust for the use of Patty Ann Young until she attained the age of 21 years; and the right of the Secretary of the Interior to approve the terms of such devise which limits his own discretionary powers over the administration of the restricted interests involved.

The gift here is to Patty Ann Young, not to the trustee personally but as her representative until she attains the age of 21 years, with no power to manage, reinvest or otherwise. The subject clause does not therefore constitute a private trust.

We find paragraph SECOND, subpart (a) and that part of subpart (b) referring to trustee's use of trust funds for the care, support and education of Patty Ann Young, to be valid and conclude that its terms may lawfully be carried out, although not perhaps without considerable administrative difficulty. Mere inconveniences of administration should not be allowed to defeat the purposes of an otherwise valid

testamentary trust. Estate of Isaac Maynard Broncheau, 61 I.D. 139 (1953). It is highly probable that Patty Ann Young had already attained the age of 21 years on the date of testatrix' demise, in which case we would not be faced with this inconvenience.

A possible legal impediment may still preclude Patty Ann from taking, since the restricted or trust property in question comes under the jurisdiction of the Tulalip Tribe who voted to accept the application of the Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. § 461 et. seq. (1970)), known as the Indian Reorganization Act, on April 6, 1935.

[4] The Act recognizes two classes of persons who may take testatrix' lands by devise, that is, any member of the Tribe having jurisdiction over such lands and legal heirs of the testator.

[5] "Any heir of such member" as used in sec. 464 means those who would, in the absence of a will, have been entitled to share in the estate.

Consequently, if upon remand Judge Snashall finds that Patty Ann is a member of the Tulalip Tribe, she would be entitled to take under paragraph SECOND of decedent's will. On the other hand, if the judge finds that she was not a member of the Tulalip Tribe then she would not be entitled to take.

In the event that Patty Ann Young is found not to be a member of the Tulalip Tribe, we find nothing illegal in our construing and we construe certain of the language of paragraph SECOND, subpart (b) to mean that, if for any reason a legal impediment is found to exist precluding Patty Ann from taking, then the same would pass to her mother, Gwendolyn Young.

To reiterate, we find that the testatrix intended the devise under paragraph SECOND to go to Patty Ann Young provided no legal impediment precluded her from taking. Further, the testatrix intended that should an impediment exist to preclude Patty Ann Young from taking, then the devise would go to her mother, Gwendolyn Young Hatch. We find that a private trust does not exist here. We conclude that a legal impediment may exist to prevent Patty Ann from taking; namely nonmembership in the Tulalip Tribe. If Judge Snashall should find that Patty Ann Young was not a member of the Tulalip Tribe then the devise would go to Patty Ann's mother, Gwendolyn Young Hatch.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is REVERSED IN PART and REMANDED to Judge Snashall for revision in accordance with the Board's directive as set forth above. The order as then issued by the Judge shall be final unless

an appeal is taken to this Board within 60 days of issuance of such order.

Mitchell J. Sabagh
Administrative Judge

We concur:

Alexander H. Wilson
Chief Administrative Judge

Wm. Philip Horton
Administrative Judge